Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEALS NO 02–4 OF 2002(W) AND NO 02–5 OF 2002(W)

HAIDAR CJ (MALAYA), STEVE SHIM CJ (SABAH & SARAWAK) AND GOPAL SRI RAM JCA

27 FEBRUARY 2004

Civil Procedure — Appeal — Appeal to Federal Court — Real issue different from questions framed before court — Whether court bound to decide on framed issues only — Duty of court to produce complete justice between parties

Statutory Interpretation — Interpretation Act — Purposive approach — Whether apply to taxing statute — Interpretation Acts 1948 and 1967 s 17A — Palm Oil Research and Development Act 1979 — Palm Oil (Research Cess) Order 1979

Statutory Interpretation — Subordinate legislation — Validity — Whether ultra vires parent Act — Test to be applied — Whether subsidiary legislation must be construed strictly — Interpretation Acts 1948 and 1967 s 17A — Palm Oil Research and Development Act 1979 — Palm Oil (Research Cess) Order 1979

Statutory Interpretation — Taxing statute — Strict interpretation — Whether purposive approach to be applied — Interpretation Acts 1948 and 1967 s 17A — Palm Oil Research and Development Act 1979 — Palm Oil (Research Cess) Order 1979

Statutory Interpretation — Taxing statute — Payment of cess on palm oil — Whether Act authorise imposition of research cess upon palm oil millers — Whether Act identify payer of research cess — Whether purposive approach applicable — Interpretation Acts 1948 and 1967 s 17A — Palm Oil Research and Development Act 1979 — Palm Oil (Research Cess) Order 1979

Revenue Law — Agricultural tax — Palm oil research cess — Whether purposive approach applicable in interpretating taxing statute — Whether Act authorise imposition of research cess upon palm oil millers — Whether Act identify payer of research cess — Palm Oil Research and Development Act 1979 — Palm Oil (Research Cess) Order 1979

Trade and Industry — Agriculture — Palm oil research cess — Whether applicable to crude palm oil and crude palm kernel oil — Whether distinction between 'seed' and 'kernel' in Palm Oil Research and Development Act 1979 and Palm Oil (Research Cess) Order 1979 — Whether absurd and unjust result in allowing cess to be imposed — Whether Act authorise imposition of research cess upon palm oil millers — Whether Act identify payer of research cess – Palm Oil Research and Development Act 1979 — Palm Oil (Research Cess) Order 1979

The appellant was the Palm Oil Research and Development Board. The respondent was a company engaged in the extraction of crude palm oil ('CPO') from the whole palm fruits and crude palm kernel oil ('CPKO') from the kernel

of oil palm fruits. By virtue of the Palm Oil (Research Cess) Order 1979 ('the 1979 Order') made under the authority of the Palm Oil Research and Development Act 1979 ('the 1979 Act'), palm oil millers were required to pay cess for every metric ton of crude oil. The respondent did not dispute the imposition of cess on CPO but contended that the cess on CPKO was invalid. It took out an action in the High Court for a declaration that the appellant was not empowered to impose cess on CPKO and therefore sought a refund of the monies paid. The High Court found in favour of the appellant. On appeal by the respondent, the Court of Appeal reversed the High Court decision. The Federal Court had granted the appellant leave on the following questions: (1) Whether the Palm Oil Research and Development Act 1979, is a taxing statute; (2) If the answer is in the affirmative, then what interpretation/approach should be taken.

The issue was whether or not the 1979 Order which provided for the levying and collection of cess by the appellant from palm oil millers in respect of both CPO and CPKO was *ultra vires* the parent statute, ie the 1979 Act. Three instances of *ultra vires* were raised by counsel for the respondent: (1) the absence of any authority in the 1979 Act, in particular, ss 2 and 14 thereof to collect cess from palm oil millers; (2) the levying of cess on CPKO was in itself *ultra vires* ss 2 and 14 of the 1979 Act because the definition of 'palm oil' in s 2 does not include 'kernel'; (3) the 1979 Order was an unauthorised enlargement of ss 2 and 14 of the 1979 Act through the use of the expression 'and/or' in para 2 which purported to define a 'palm oil miller'.

Held, dismissing the appeals with costs:

(1) (per **Steve Shim CJ (Sabah & Sarawak)**, **Haidar CJ (Malaya)** concurring) Section 17A of the Interpretation Acts 1948 and 1967 enjoins the purposive approach to statutory interpretation. This applies to all statutes including taxing statues (see paras 2 and 15).

(2) (per **Steve Shim CJ (Sabah & Sarawak)**, **Haidar CJ (Malaya)** concurring) When the words 'the orders may specify the nature, the amount or rate and the manner of collection of the cess' are examined in their proper context *vis-a-vis* the provisions reflected in the 1979 Order, there can be no doubt that the Minister, in effecting the said 1979 Order, had complied with s 14(1) of the 1979 Act as regards the imposition of cess on CPO. However, the position in respect of cess on CPKO was quite different (see para 23). Also, the words 'manner of collection of the cess' in s 14(1) phrase must necessarily relate to the process involved in the collection of cess, ie the methods to be employed in collecting the cess. Clearly, the methods would entail the essential elements of how, by whom and from whom the cess is to be collected. These essential elements were fully reflected in the provisions of the 1979 Order. In the circumstances, the court was unable to accept respondent counsel's contention that s 14(1) read with s 2 of the 1979 Act did not empower

the Minister to impose cess on palm oil millers in respect of CPO (see paras 6 and 24).

(3) (per **Steve Shim CJ (Sabah & Sarawak)**) The kernel is merely part of the seed. The 1979 Act and the Orders made thereunder only make reference to the seed and not the kernel. An ambiguity has therefore arisen. If kernel was intended and not the whole seed, then the 1979 Act and the Orders made thereunder would have contained clear words to that effect. Indeed, by way of analogy, the Act and Orders have, for the purpose of levying cess on CPO, accentuated the distinction between oil palm fruits and their seeds. The distinction between the seed and the kernel had to be expressed in clear terms for the purpose of imposing cess on CPKO. In the absence of such clear words, it would be unfair and inappropriate to construe the relevant provisions as having the effect of imposing cess on CPKO. In the circumstances, there was sufficient merit in respondent counsel's contention that levying cess on CPKO was, by itself, *ultra vires* the 1979 Act (see para 26).

(4) (per **Gopal Sri Ram JCA**) The two questions framed in the application for leave in the Federal Court bear no relevance whatsoever to the real issues in this case. The real and live issue in this case concerned the *vires* of certain subsidiary legislation brought into existence by the Minister. The question whether the 1979 Act is a taxing statute was only collaterally relevant to the real issue (see para 30). However, this does not relieve the court of its duty to hear and determine this appeal on its merits. Although this court should give leave sparingly, once leave is granted, it is not bound to limit itself to the framed issues. It may deal with any matter which it considers relevant for the purpose of doing complete justice according to the substantial merits of a particular case (see para 31); *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337 followed. The court's task is to adopt that course which will produce complete justice as between the parties and should not for a moment to allow any technicality to stand in its way of achieving that end (see para 34).

(5) (per **Gopal Sri Ram JCA**) The constitutionality of a piece of subsidiary legislation is to be adjudged only by a three-fold test, namely: (1) whether the provisions of such regulations fall within the scope and ambit of the power conferred by the statute on the delegate; (2) whether the rules/regulations framed by the delegate are to any extent inconsistent with the provisions of the parent enactment; and lastly (3) whether they infringe any of the fundamental rights or other restrictions or limitations imposed by the Constitution (see para 57). The court is to bear in mind when adjudicating upon a public law case that all State action must in appropriate cases be in accordance with the terms of any relevant written law but must *in all cases* be in accordance with the provisions of the

Federal Constitution, in particular the fundamental liberties guaranteed by Part II thereof (see para 58); *McEldowney v Forde* [1971] AC 632 and *Maharashtra SBOS & HS Education v Paritosh* AIR 1984 SC 1548 followed.

(6) (per **Gopal Sri Ram JCA**) A provision in a statute conferring power on a member of the Executive to enact subsidiary legislation must be construed strictly. This is particularly so where the subsidiary legislation is one that imposes a financial levy — be it tax or charge or cess — upon the whole or any section of the public (see para 61); *Attorney General v Wilts United Dairies Ltd* (1921) 37 TLR 884, (1922) 38 TLR 781 followed.

(7) (per **Gopal Sri Ram JCA**) Section 14(1) empowers the Minister, *inter alia*, to impose research cess on *palm oil*: not on palm oil millers (see para 60). Thus, the 1979 Act did not authorise the imposition of the research cess upon palm oil millers (see para 69). Section 14 of the 1979 Act also did not identify the payer of the research cess (see para 66). Based on these matters, the 1979 Order was *ultra vires* the 1979 Act (see para 69).

(8) (per **Gopal Sri Ram JCA**) The element of compulsion was evident in the 1979 Order which makes non payment of research cess an offence punishable by a fine of RM1,000 or to a term of imprisonment not exceeding six months or to both such punishments. Accordingly, the research cess was indeed a tax (see para 72); *Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Ltd* [1933] AC 168 followed. Parliament via s 17A of the Interpretation Acts 1948 and 1967 requires the court to adopt a purposive approach (see para 76). There is no doubt that even a taxing statute must be given a purposive approach (see para 77).

(9) (per **Gopal Sri Ram JCA**) When construing a taxing or other statute, the sole function of the court is to discover the true intention of Parliament. In that process, the court is under a duty to adopt an approach that produces neither injustice nor absurdity: in other words, an approach that promotes the purpose or object underlying the particular statute *albeit* that such purpose or object is not expressly set out therein. Imposing a tax by means of subsidiary legislation on a person not identified in the parent Act produces an absurd and unjust result and therefore does not promote its purpose or object (see para 79); *Mangin v Inland Revenue Commissioner* [1971] AC 739 followed.

[**Bahasa Malaysia summary**

Perayu merupakan Lembaga Penyelidikan dan Kemajuan Minyak Kelapa Sawit. Responden merupakan sebuah syarikat yang terlibat di dalam pengekstrakan minyak mentah kelapa sawit ('CPO') daripada keseluruhan buah kelapa sawit dan minyak isi rong kelapa sawit ('CPKO') daripada isi rong buah kelapa sawit. Berdasarkan kepada Perintah Minyak Kelapa Sawit (Ses Penyelidikan)

1979 ('Perintah 1979') yang dibuat di bawah kuasa Akta Penyelidikan dan Kemajuan Minyak Kelapa Sawit ('Akta 1979'), pengilang-pengilang minyak kelapa sawit dikehendaki membayar ses untuk setiap tan minyak mentah. Responden tidak mempertikaikan pengenaan ses ke atas CPO tetapi berhujah bahawa ses ke atas CPKO adalah tidak sah. Ia telah mengambil tindakan di Mahkamah Tinggi untuk suatu deklarasi bahawa perayu tidak diberi kuasa untuk mengenakan ses ke atas CPKO dan oleh itu menuntut bayaran balik wang yang telah dibayar. Mahkamah Tinggi memutuskan dengan berpihak kepada perayu. Atas rayuan responden, Mahkamah Rayuan telah mengakaskan keputusan Mahkamah Tinggi. Mahkamah Persekutuan telah memberikan kebenaran kepada perayu atas persoalan-persoalan berikut: (1) Sama ada Akta 1979, adalah statut bercukai; (2) Sekiranya jawapannya adalah affirmatif, apakah tafsiran/pendekatan yang harus diambil.

Isu adalah sama ada atau tidak Perintah 1979 yang menyediakan untuk levi dan pungutan ses oleh perayu daripada pengilang-pengilang minyak kelapa sawit berhubung dengan kedua-dua CPO dan CPKO adalah *ultra vires* statut ibu, iaitu Akta 1979. Tiga kejadian *ultra vires* telah ditimbulkan oleh peguam responden: (1) ketiadaan sebarang kuasa di dalam Akta 1979, khususnya, ss 2 dan 14 untuk memungut ses daripada pengilang-pengilang minyak kelapa sawit; (2) levi ses atas CPKO dengan sendirinya *ultra vires* ss 2 dan 14 Akta 1979 kerana tafsiran 'minyak kelapa sawit' di dalam s 2 tidak termasuk 'isi rong'; (3) Perintah 1979 adalah pembesaran ss 2 dan 4 Akta 1979 yang tidak dibenarkan melalui penggunaan ungkapan 'dan/tidak' di dalam perenggan 2 yang diandaikan untuk mentafsirkan 'pengilang-pengilang kelapa sawit'.

Diputuskan, menolak rayuan-rayuan dengan kos:

(1) (oleh **Steve Shim Hakim Besar (Sabah & Sarawak)**, **Haidar Hakim Besar (Malaya)** bersetuju) Seksyen 17A Akta Tafsiran 1948 dan 1967 mengarahkan pendekatan purposif kepada pentafsiran statut. Ini terpakai kepada kesemua statut termasuk statut bercukai (lihat perenggan 2 dan 15).

(2) (oleh **Steve Shim Hakim Besar (Sabah & Sarawak)**, **Haidar Hakim Besar (Malaya)** bersetuju) Apabila perkataan-perkataan 'the orders may specify the nature, the amount or rate and the manner of collection of the cess' diteliti di dalam konteks yang betul berkenaan peruntukan-peruntukan yang digambarkan di dalam Perintah 1979, tiada lagi keraguan bahawa Menteri, di dalam melaksanakan Perintah 1979 tersebut, telah mematuhi s 14(1) Akta 1979 berhubung dengan pengenaan ses ke atas CPO. Walau bagaimanapun, kedudukan ses ke atas CPKO adalah berlainan (lihat perenggan 23). Juga, perkataan-perkataan 'manner of collection of the cess' di dalam frasa 14(1) mestilah berkaitan dengan proses yang terlibat di dalam pungutan ses, iaitu kaedah-kaedah yang digunakan di dalam pungutan ses. Jelasnya, kaedah-kaedah itu memerlukan elemen-elemen penting bagaimana, oleh siapa dan daripada siapa ses itu patut dipungut.

Elemen-elemen penting ini telah digambarkan sepenuhnya di dalam peruntukan-peruntukan Perintah 1979. Di dalam keadaan ini, mahkamah tidak menerima pendapat peguam responden bahawa s 14(1) dibaca bersama s 2 Akta 1979 tidak memberi kuasa kepada Menteri untuk mengenakan ses ke atas pengilang-pengilang kelapa sawit berhubung dengan CPO (lihat perenggan 6 dan 24).

(3) (oleh **Steve Shim Hakim Besar (Sabah & Sarawak)**) Isi rong adalah sebahagian daripada biji. Akta 1979 dan Perintah-Perintah yang dibuat di bawahnya hanya merujuk kepada biji dan bukannya isi rong. Oleh itu, kesamaran telah timbul. Jika isi rong yang dimaksudkan, dan bukan keseluruhan biji, maka Akta 1979 dan Perintah-Perintah yang dibuat dibawahnya haruslah mengandungi perkataan-perkataan jelas yang mendatangkan kesan kepadanya. Sudah tentu, secara analogi, Akta 1979 dan Perintah-Perintah, bagi maksud pengenaan ses ke atas CPO, telah menekankan perbezaan di antara buah kelapa sawit dan bijinya. Perbezaan di antara biji dan isi rong juga harus dinyatakan melalui ungkapan-ungkapan yang jelas bagi tujuan mengenakan ses ke atas CPKO. Dalam ketiadaan ungkapan-ungkapan sedemikian, adalah tidak adil dan tidak wajar untuk mentafsir peruntukan-peruntukan berkenaan mempunyai kesan pengenaan ses ke atas CPKO. Di dalam keadaan ini, terdapat merit yang mencukupi di dalam penghujahan peguam responden bahawa mengenakan ses ke atas CPKO, dengan sendirinya, adalah *ultra vires* Akta 1979 (lihat perenggan 26).

(4) (oleh **Gopal Sri Ram HMR**) Dua persoalan yang dirangka di dalam permohonan untuk kebenaran di Mahkamah Persekutuan tidak relevan langsung kepada isu-isu sebenar di dalam kes ini. Isu sebenar dan hidup di dalam kes ini adalah berkenaan dengan *vires* beberapa perundangan subsidiari yang telah diwujudkan oleh Menteri. Persoalan sama ada Akta 1979 merupakan statut bercukai hanya relevan secara kolateral kepada isu sebenar (lihat perenggan 30). Walau bagaimanapun, ini tidak melepaskan Mahkamah daripada tugasnya untuk mendengar dan memutuskan rayuan ini atas meritnya. Walaupun mahkamah ini harus memberikan kebenaran dengan berhati-hati, sekali kebenaran diberikan, ia tidak boleh menghadkannya kepada isu-isu yang dirangka. Ia boleh membicarakan sebarang perkara yang dianggap relevan untuk keadilan yang sempurna berdasarkan merit substantial sesuatu kes (lihat perenggan 31); *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337 diikut. Fungsi mahkamah adalah menggunakan pendekatan yang akan mewujudkan keadilan yang sempurna di antara pihak-pihak dan tidak boleh sekali-kali membenarkan sebarang alasan-alasan teknikal berdiri di dalam laluannya untuk mencapai keadilan tersebut (lihat perenggan 34).

(5) (oleh **Gopal Sri Ram HMR**) Keperlembagaan satu-satu perlembagaan subsidiari sepatutnya dihakimi oleh tiga ujian yang berkaitan, iaitu: (1)

sama ada peruntukan-peruntukan perlembagaan tersebut jatuh di dalam skop dan lingkungan kuasa yang dianugerahkan oleh statut kepada delegasi; (2) sama ada kaedah-kaedah/peraturan-peraturan yang dirangka oleh delegasi adalah tidak konsisten dengan peruntukan-peruntukan di dalam enakmen ibu; dan akhirnya (3) sama ada ia telah melanggar sebarang hak-hak fundamental atau sekatan-sekatan atau limitasi-limitasi lain yang dikenakan oleh Perlembagaan (lihat perenggan 57). Mahkamah seharusnya memikirkan apabila memberikan hukuman sesuatu kes undang-undang awam bahawa kesemua tindakan Negeri mestilah di dalam kes-kes yang sesuai berdasarkan terma-terma sebarang undang-undang bertulis yang berkaitan tetapi mesti *di dalam setiap kes*berdasarkan kepada peruntukan-peruntukan di dalam Perlembagaan Persekutuan, khususnya kebebasan fundamental yang dijamin oleh Bahagian II (lihat perenggan 58); *McEldowney v Forde* [1971] AC 632 dan *Maharashtra SBOS & HS Education v Paritosh* AIR 1984 SC 1548 diikut.

(6) (oleh **Gopal Sri Ram HMR**) Peruntukan di dalam sesuatu statut yang memberikan kuasa ke atas ahli Eksekutif untuk memperbuat perlembagaan subsidiari mestilah ditafsirkan secara ketat. Ini terutamanya di mana perlembagaan subsidiari adalah satu-satunya yang mengenakan levi kewangan — sama ada ia adalah cukai atau caj atau ses — kepada kesemua atau sebahagian daripada orang awam (lihat perenggan 61); *Attorney General v Wilts United Dairies Ltd* (1921) 37 TLR 884, (1922) 38 TLR 781 diikut.

(7) (oleh **Gopal Sri Ram HMR**) Seksyen 14(1) memberi kuasa kepada Menteri, antara lainnya, untuk mengenakan ses kajian ke atas minyak kelapa sawit: bukan ke atas pengilang-pengilang minyak kelapa sawit (lihat perenggan 60). Justeru itu, Akta 1979 tidak memberi kuasa pengenaan ses kajian ke atas pengilang-pengilang minyak kelapa sawit (lihat perenggan 69). Seksyen 14 Akta 1979 juga tidak mengenal pasti pembayar ces kajian (lihat perenggan 66). Berdasarkan perkara-perkara ini, Perintah 1979 adalah *ultra vires* Akta 1979 (lihat perenggan 69).

(8) (oleh **Gopal Sri Ram HMR**) Elemen pemaksaan adalah nyata di dalam Perintah 1979 yang menjadikan tidak membayar ses kajian suatu kesalahan yang boleh dihukum denda sebanyak RM1,000 atau penjara tidak melebihi enam bulan atau kedua-duanya sekali. Sewajarnya, ses kajian sebenarnya adalah suatu cukai (lihat perenggan 72); *Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Ltd* [1933] AC 168 diikut. Parlimen melalui s 17A Akta Tafsiran 1948 dan 1967 meminta mahkamah untuk menerima pendekatan purposif (lihat perenggan 76). Tidak ada keraguan bahawa suatu statut bercukai juga mestilah diberi pendekatan purposif (lihat perenggan 77).

(9) (oleh **Gopal Sri Ram HMR**) Apabila mentafsirkan sesuatu statut bercukai atau statut lain, fungsi utama mahkamah adalah untuk mendapatkan niat

Parlimen yang sebenar. Di dalam proses ini, mahkamah mempunyai tugas untuk memakai pendekatan yang tidak akan menyerlahkan sebarang ketidakadilan atau kedangkalan: di dalam lain perkataan, suatu pendekatan yang mempromosikan tujuan atau objek yang membayangi statut berkenaan, walaupun tujuan atau objek tersebut tidak dinyatakan secara jelas di dalamnya. Mengenakan cukai melalui perundangan subsidiari ke atas seseorang yang tidak dikenal pasti di dalam Akta ibu akan menghasilkan satu keputusan yang dangkal dan tidak adil dan kerana itu tidak mempromosikan tujuan mahupun objeknya (lihat perenggan 79); *Mangin v Inland Revenue Commissioner* [1971] AC 739 diikut.]

Notes

For cases on appeals to Federal Court, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) para 599.

For cases on palm oil research cess, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) para 1578.

For cases on purposive approach, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1538–1563.

For cases on revenue law generally, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1950–2468.

For cases on strict construction, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1978–1980.

For cases on validity of subordinate legislation, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1697–1970.

Cases referred to

Accident Towing & Advisory Committee v Combined Motor Industries Pty Ltd [1987] VR 529 (refd)

AG v Carlton Bank (1899) 2 QB 158 (refd)

Air Caledonie International v The Commonwealth (1988) 165 CLR 462 (refd)

Attorney General v Wilts United Dairies Ltd (1921) 37 TLR 884, (1922) 38 TLR 781 (folld)

Australian Tape Manufacturers Ltd v The Commonwealth (1991) 177 CLR 480 (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab-Malaysian Finance Bhd [1998] 1 MLJ 393 (refd)

Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345 (refd)

City of Halifax v Nova Scotia Car Works Ltd [1914] AC 992 (refd)

Comptroller-General of Inland Revenue, Malaysia v T [1970] 2 MLJ 35 (refd)

Council of Civil Unions v Minister for the Civil Service [1985] AC 374 (refd)

Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29 (refd)

Deputy Commissioner of Taxation v Truhold Benefit Pty Ltd (1985) 158 CLR 678 (refd)

Gruen Watch of Canada Ltd v Attorney General of Canada [1950] OR 429 (refd)

Kerajaan Malaysia v Wong Pot Heng [1997] 1 MLJ 437 (refd)

Wong Pot Heng & Anor v Kerajaan Malaysia [1992] 2 MLJ 885 (refd)

A *Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Ltd* [1933] AC 168 (folld)
Luke v IRC [1963] AC 557 (refd)
Maharashtra SBOS & HS Education v Paritosh AIR 1984 SC 1548 (folld)
Mangin v Inland Revenue Commissioner [1971] AC 739 (folld)
B *McCarthy & Stone (Developments) Ltd v Richmond Upon Thames Borough Council* [1992] 2 AC 48 (refd)
McEldowney v Forde [1971] AC 632 (folld)
Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia [1999] 2 MLJ 337 (folld)
National Land Finance Co-operative Society Ltd v Director General of Inland Revenue
C [1994] 1 MLJ 99 (refd)
Ong Ah Chuan v Public Prosecutor [1981] 1 MLJ 64 (refd)
Pepper (Inspector of Taxes) v Hart [1993] AC 593 (refd)
R Rama Chandran v Industrial Court Malaysia [1997] 1 MLJ 145 (refd)
Raphael Pura v Insas Bhd & Ors [2003] 1 CLJ 61 (refd)
Reyes v The Queen [2002] 2 AC 235 (refd)
D *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204 (refd)
Shri Sitaram Sugar Co Ltd v Union of India & Ors [1990] 3 SCC 223 (refd)
Supreme Court Employees Welfare Association v Union of India AIR 1990 334 (refd)
United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin [2001] 1 MLJ 561 (refd)
WT Ramsay Ltd v Inland Revenue Commission [1982] AC 300 (refd)
E

Legislation referred to

Federal Constitution art 4, Part II
Interpretation Acts 1948 and 1967 s 17A
F Palm Oil (Research Cess) Order 1979 paras 1, 2, 3, 6
Palm Oil Research and Development Act 1979 ss 2, 14(1)
Rules of the Federal Court 1995

Shahul Hameed Amirudin (Woo Lai Mei with him) (Zul Rafique & Partners) for the appellants.
G *Cyrus Das (Arjunan Subramaniam and Geraldine Yeoh with him) (Geraldine Yeoh, Arjunan & Assoc) for the respondent.*

Haidar CJ (Malaya):

H **[1]** I have had the opportunity of considering in draft the judgments of Steve LK Shim CJ (Sabah & Sarawak) and Gopal Sri Ram JCA in respect of the two appeals *viz*, 03–02–04 of 2002 (W) and 02–05 of 2002 (W) before us. I agree that the two appeals be dismissed with costs. I order the deposits to go towards the taxed costs.

I **[2]** I would, in addition, like to expressly state that I agree with the reasons advanced by my learned brother, Chief Judge (Sabah & Sarawak) in answering the questions posed for our consideration. It is clear beyond doubt that in

view of s 17A of the Interpretation Acts 1948 and 1967 there is now a statutory recognition for the courts to take purposive approach in the interpretation of statutes including taxing statutes.

[3] In England, though there is no equivalent provision of our s 17A there, the House of Lords in dealing with a taxing statute in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 (by majority) took a purposive approach. This is what Lord Griffiths said at p 617:

> The ever increasing volume of legislation must inevitably result in ambiguities of statutory language which are not perceived at the time the legislation is enacted. The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.

[4] The case of *Pepper v Hart* on the purposive approach was quoted with approval by this court in *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345.

[5] The other interesting issue that was raised before us for the first time is that there is no provision in the Palm Oil Research and Development Act 1979 ('the Act') empowering the Minister to impose research cess on palm oil millers. It is on the ground that the payer of the research cess has not been identified by the Act. Hence counsel for the respondent contended that the Minister not only did not have the legal authority to impose research cess on the crude palm kernel oil ('CPKO') but also on the crude palm oil ('CPO') on the respondent and referred to ss 2 and 14(1) of the Act. This issue was not raised before the High Court as well as the Court of Appeal.

[6] By the respondent's own prayer in its statement of claim by way of prayer (a) the respondent claims for a declaration that the Minister is not empowered under the Act or the 1979 Order to levy research cess on the respondent for the production and extraction of CPKO. In addition thereto the record of appeal showed that the respondent admitted that as palm oil millers it is liable to pay research cess on CPO and what is disputed by the respondent is that it is not liable to pay research cess on CPKO. It is trite law that the parties are bound by their pleadings (*Raphael Pura v Insas Bhd & Ors* [2003] 1 CLJ 61 at p 98). However, it seemed that the respondent is relying on jurisdictional point in contending that it is entitled to raise the CPO issue before us (*Badiaddin bin Mohd Mahidin & Anor v Arab-Malaysian Finance Bhd* [1998] 1 MLJ 393 at p 427). Be that as it may, for the reasons stated by the learned Chief Judge (Sabah & Sarawak), with which I agree, the jurisdictional point

has no merits. In that event I agree that the Court of Appeal was correct to set aside the judgment of the learned High Court judge on the sole ground that the Minister is not empowered under the Act or the 1979 Order to impose research cess on CPKO on the respondent. In the circumstances I affirm the orders made by the Court of Appeal.

Steve Shim CJ (Sabah & Sarawak):

[7] There are two appeals before us. Both involve the same issues. These issues form two parts of an equation. The first part relates to the leave questions postulated for our consideration. The second part concerns issues arising therefrom but in the context of the disputes between the appellants and the respondent. It is necessary to deal with them in that sequence.

[8] On the first part, the Federal Court had, on 2 October 2002, granted the appellants leave on the following questions:

(1) Whether the Palm Oil Research and Development Act 1979, is a taxing statute;

(2) If the answer is in the affirmative, then what interpretation/ approach should be taken.

[9] These questions involve pure issues of law. In dealing with the first question, it is immediately clear that the Palm Oil Research and Development Act 1979 ('the 1979 Act') does not provide for the definition of the term 'cess' stipulated under Part V therein. So it is to the dictionary meaning that one must turn. In the *Oxford English Dictionary*, it is defined as an assessment, tax or levy. In *Webster's Third New International Dictionary*, it is described as an assessment, levy or tax. The same description is found in *Black's Law Dictionary*. Thus, by all accounts, cess is a form of tax. To impose cess is to impose tax. Compulsion is an essential feature of taxation (see *City of Halifax v Nova Scotia Car Works Ltd* [1914] AC 992; *Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Ltd* [1933] AC 168). The element of compulsion is clearly evident in the Palm Oil (Research Cess) Order 1979 ('the 1979 Order') made under the authority of the parent 1979 Act. Under the said 1979 Order, penalties are imposed for failure to pay the research cess. For example, s 6 thereof states:

> Any person who contravenes any provision of this Order shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.

[10] In the circumstances and for the reasons stated, the answer to the first question must be in the affirmative.

[11] Now, the Court of Appeal, in the present case, had expressly held that the provisions of a taxing statute should be construed strictly without regard to the purpose, object or intent of the statute, relying, quite obviously, on the

Supreme Court case of *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99 when Gunn Chit Tuan CJ (Malaya) said:

> There are ample authorities to show that the Courts have refused to adopt a construction of a taxing statute which would impose liability when doubt exists. In *Re Micklewait,* it was held that a subject was not to be taxed without clear words. We realize that revenue from taxation is essential to enable the Government to administer the country and that Courts should help in the collection of taxes whilst remaining fair to tax payers. Nevertheless, we should remind ourselves of the principle of strict interpretation as stated by Rowlatt J in *Cape Brandy Syndicate v Inland Revenue Commissioners*… It has been said by the Judicial Committee in *Oriental Bank Corp v Wright* that the intention to impose a charge upon a subject must be shown by clear and unambiguous language.

[12] With respect, the principle of strict interpretation of statutes enunciated by Rowlatt J could not be regarded as the *locus classicus* on the issue. Indeed as long ago as 1899, Lord Russell of Killowen CJ took a different approach in *AG v Carlton Bank* (1899) 2 QB 158, when he said *inter alia*:

> I see no reason why special canons of construction should be applied to any Act of Parliament and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of a court is, in my opinion, in all cases the same; whether the Act to be construed relates to taxation or any other subject, viz to give effect to the intention of the legislature.

[13] In *Luke v IRC* [1963] AC 557, Lord Reid in the House of Lords, echoed similar views. And much later, Lord Wilberforce expanded the principle in *WT Ramsay Ltd v Inland Revenue Commission* [1982] AC 300 when he said as follows:

> A subject is only to be taxed on clear words, not on 'intendment' or on the 'equity' of an Act... What are 'clear words' is to be ascertained on normal principles; these do not confine the courts to literal interpretation. They may, indeed should, be considered in the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded...

[14] This is known as the *Ramsay* principle. While clear words are needed before a tax can be imposed, what those words are would be interpreted in line with the purposive approach. Undoubtedly, in the United Kingdom, there is currently a more pronounced shift from the strict literal interpretation of a taxing statute. The *Ramsay* principle of statutory interpretation seems to have entrenched itself (see *Pepper (Inspector of Taxes) v Hart* [1993] AC 593). In Malaysia, that principle should apply and it must be applied in consonance with s 17A of the Interpretation Acts 1948/1967 which stipulates:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[15] It is pertinent to note that s 17A was a recent amendment under the Interpretation (Amendment) Act 1997 (Act A996) and became effective on 25 July 1997. This would be after the *National Land Finance Co-operative*. In my view, the law is now clear beyond doubt. Section 17A above enjoins the purposive approach to statutory interpretation. This applies to all statutes including taxing statues. That answers the second question posed.

[16] I now come to the second part of the equation. Here, the central issue relates to the question of whether or not the 1979 Order is *ultra vires* the parent statute, ie the 1979 Act. Three instances of *ultra vires* were raised by counsel for the respondent. In my view the proper determination of this issue requires an appreciation of the factual background circumstances. By virtue of 1979 Order made under the authority of the 1979 Act, palm oil millers were required to pay cess for every metric ton of crude oil. The 1979 Order was amended in 1982. Pursuant to the amended Order, the appellants imposed cess on the respondent in respect of crude oil extracted from crude palm oil ('CPO') and from crude palm kernel oil ('CPKO') with effect from 1 July 1980. The respondent did not dispute the imposition of cess on CPO but contended that the cess on CPKO was invalid. It took out an action in the High Court for a declaration that the appellants were not empowered to impose cess on CPKO and therefore sought a refund of the monies paid. The High Court found in favour of the appellants holding as follows:

(i) both CPO and CPKO were products of the same fruit and the terms were used loosely to identify the origin of the extract only;

(ii) the words 'fruits and seeds' in the 1979 Act, the words 'fruits and/or seeds' in the 1979 Order and the words 'crude palm oil extracted from oil palm fruits' and 'crude palm oil extracted from oil palm seeds' in the 1982 Order were used loosely and should be read harmoniously so as to convey the intention of Parliament that all palm oil millers were required to pay cess on any kind of crude oil;

(iii) the words 'and' and 'and/or' were interchangeably used to convey a disjunctive meaning.

[17] On appeal by the respondent, the Court of Appeal reversed the High Court decision. Two judgments were rendered. Mokhtar Sidin JCA took the position that the 1979 Act was a taxation statute and as such, a strict interpretation had to be applied and any ambiguity must be resolved in favour of the taxpayer. In his view, the 1979 Act only imposed cess on crude palm oil extracted from the fruits and seeds and not on oil extracted from the kernel. Hence, according to him, cess could only be imposed on CPO and not on CPKO. KC Vohrah JCA took a different route in arriving at the same conclusion. He held that there was no reference to oil palm kernel either in the parent 1979 Act or in the Orders made thereunder; that the trial judge had erred in interpreting the 1979 Order to widen the scope of its application despite noticing the inherent

ambiguity of the language used in s 2 of the 1979 Act and the various Orders made thereunder, being in the nature of subsidiary legislation, could not enlarge what was circumscribed by the enabling Act; that words in a taxing provision could not be used loosely but must be clear and unambiguous.

[18] As I said earlier, respondent's counsel has raised three instances of *ultra vires*. First, he submits that there is no authorisation in the 1979 Act for the collection of cess from palm oil millers in respect of both CPO and CPKO. This seems to be somewhat of a departure from the position taken by the respondent in the Court of Appeal. In any event, counsel in advancing this proposition, has drawn particular attention to the provisions in s 2 and s 14(1) of the 1979 Act, s 2 states:

> In this Act, unless the context otherwise requires:
>
> 'Board' means the Malaysian Palm Oil Research & Development Board established under s 3;
>
> 'Minister' means the Minister for the time being charged with the responsibility for the oil palm industry;
>
> 'palm oil' means oil, whether in crude or further processed form, extracted from oil palm fruits and seeds.

[19] And s 14(1) stipulates:

> The Minister may, after consultation with the Board and with the Minister of Finance, make orders for the imposition, variation or cancellation of a research cess on palm oil; and the orders may specify the nature, the amount and rate and the manner of collection of the cess.

[20] Here, counsel for the respondent argues that nothing in those sections can be construed as empowering the Minister to impose research cess on palm oil millers. In my view, it is significant to take a closer look at s 14(1) in particular the words 'and the orders may specify the nature, the amount and rate and the manner of collection of the cess'. The words are sufficiently clear. There are three parts involved, namely, the nature of the cess, the amount and rate of the cess and the manner of collection of the cess. As regards the nature of the cess, this must relate to the research cess to be imposed on a person who carries on the business of extracting oil from oil palm fruits and/or seeds. And such a person is defined as a palm oil miller. Thus, the nature of the cess to be imposed is clearly reflected in paras 1 and 2 of the 1979 Order which stipulate:

> (1) This Order may be cited as the Palm Oil (Research Cess) Order 1979 and shall come into force on the 1 January 1980.
>
> (2) In this Order 'palm oil miller' means a person who carries on the business of extracting oil from oil palm fruits and/or seeds.

[21] As regards the amount and rate of the cess to be imposed, this is reflected in para 3 of the 1979 Order which states:

> 3 Every palm oil miller shall pay a cess of four ringgit for every metric ton or part of a metric ton of crude palm oil produced by him.

[22] On the manner of collection of the said cess, paras 4 and 5 of the 1979 Order provide as follows:

> (4) Every palm oil miller shall pay cess to the Palm Oil Research & Development Board not later than the 35th day of each quarter of a calendar year for crude palm oil produced by him during the preceding quarter.
>
> (5) Every palm oil miller shall submit to the Board not later than the seventh day of each month a true return in the appropriate form as prescribed by the Board showing the amount of crude palm oil produced by him during the preceding month.

[23] Thus, when the words 'the orders may specify the nature, the amount or rate and the manner of collection of the cess' are examined in their proper context *vis-a-vis* the provisions reflected in the 1979 Order, there can be no doubt that the Minister, in effecting the said 1979 Order, has complied with s 14(1) of the 1979 Act as regards the imposition of cess on CPO. The position in respect of cess on CPKO is quite different. I shall deal with this later.

[24] Another significant point of focus is the words 'manner of collection of the cess' in s 14(1). This phrase must necessarily relate to the process involved in the collection of cess. This means the methods to be employed in collecting the cess. Clearly, the methods would entail the essential elements of how, by whom and from whom the cess is to be collected. To construe otherwise would give rise to an absurdity. These essential elements are fully reflected in the provisions of the 1979 Order. In the circumstances, I am unable to accept respondent counsel's contention that s 14(1) read with s 2 of the 1979 Act does not empower the Minister to impose cess on palm oil millers in respect of CPO. That proposition has no merit whatsoever. I therefore reject it accordingly.

[25] Secondly, counsel for the respondent submits that levying cess on CPKO is by itself *ultra vires* s 2 and s 14(1) of the 1979 Act. It is his contention that CPKO is not crude oil from oil palm fruits or seeds. The appellants contend otherwise. Given this impasse, it is perhaps pertinent to appreciate the extraction process in respect of CPO and CPKO respectively. CPO is obtained as follows: The mature bunches are harvested and boiled to disinfect and soften the fruit. Then the fruits are removed from their bunches. These are again rebelled for about 30 to 45 minutes. The next step is to pound the fruits while they are still hot and soft to separate the pericarp from the kernel. After the separation, the pericarp is pounded until no streak of coloured outer skin is seen. The pounded mass is then loaded into a press for the extraction

of the oil. CPKO, on the other hand, comes from the kernel of the crushed fruits. Crude oil is extracted chemically from the kernel, and is not extracted by a crushing or pressing process. The kernel is the soft white substance found within the nut. The nut consists of a hard outer shell encasing the soft inner core or kernel.

[26] Now, the respondent takes the stand that CPKO could not be said to be the seed and therefore the attempt under the 1979 Order to include CPKO as subject to cess is illegal and *ultra vires* the 1979 Act. The appellants however contend it is perfectly proper and legal to impose cess on CPKO as the kernel (the soft white substance) forms part of the seed or nut. This proposition, in itself, admits of a distinction between the seed and the kernel. Clearly the seed is not the kernel. The kernel is merely part of the seed. And the 1979 Act and the Orders made thereunder only make reference to the seed and not the kernel. An ambiguity has therefore arisen. If kernel was intended and not the whole seed, then the 1979 Act and the Orders made thereunder would have contained clear words to that effect. Indeed, by way of analogy, the Act and Orders have, for the purpose of levying cess on CPO, accentuated the distinction between oil palm fruits and their seeds. In my view, the distinction between the seed and the kernel has to be expressed in clear terms for the purpose of imposing cess on CPKO. In the absence of such clear words, it would be unfair and inappropriate to construe the relevant provisions as having the effect of imposing cess on CPKO. In the circumstances, I find sufficient merit in respondent counsel's contention that levying cess on CPKO is, by itself, *ultra vires* the 1979 Act. And I may add, it is also *ultra vires* the 1979 Order.

[27] Given the conclusion I take, I find it unnecessary to deal with respondent counsel's third proposition. Suffice to say that I agree with the Court of Appeal in holding that the trial judge had erred in interpreting the 1979 Order to widen the scope of its application to cover the imposition of research cess on CPKO having regard to the language in s 2 of the 1979 Act. The 1979 Order is in the nature of a subsidiary legislation and cannot therefore enlarge what is circumscribed by the enabling Act.

[28] For all the reasons stated, I find it appropriate to dismiss the appeal with costs. Deposits to account of taxed costs.

Gopal Sri Ram JCA:

[29] On 2 October 2002, a differently constituted bench of this court granted the appellant leave to appeal in respect of the following two issues:

(i) Whether the Palm Oil Research and Development Act 1979 is a taxing statute; and

(ii) If the answer is in the affirmative, then what interpretation/ approach should be taken.

[30] When this appeal was called on for hearing on 16 June 2003, learned counsel for the respondent, in the course of his submissions, said that the two questions framed bear no relevance whatsoever to the real issues in this case. Having read and re-read the appeal record for the purpose of writing this judgment I must say at once that I am entirely in agreement with this submission. In my respectful view, the real and live issue in this case concerns the *vires* of certain subsidiary legislation brought into existence by the Honourable Minister. The question whether the Palm Oil Research and Development Act 1979 ('the 1979 Act') is a taxing statute is only collaterally relevant to the real issue.

[31] Does this relieve this court of its duty to hear and determine this appeal on its merits? With respect, I do not think that it does. Although this court should give leave sparingly, once leave is granted, it is not bound hand and foot to limit itself to the framed issues. It may deal with any matter which it considers relevant for the purpose of doing complete justice according to the substantial merits of a particular case. Edgar Joseph Jr FCJ put the point beyond doubt in his judgment delivered in this court in *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337. His lordship there said:

> A preliminary question arises whether counsel for ABOM is precluded from raising points other than the threshold jurisdiction point in order to hold the judgment he had obtained in the Court of Appeal bearing in mind that the sole ground upon which the Court of Appeal had reversed the High Court and quashed the decision of the Minister was the threshold jurisdiction point and, furthermore, that in accordance with r 108(1) of the Rules of the Federal Court 1995, ('the Rules') the order of this court granting leave to appeal specified only that issue for determination on the appeal to itself.
>
> We are aware of the decision of this court in *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151 where separate judgments were delivered and one of the judges held (at p 173E) that having regard to the provisions of r 108(1)(c) of the Rules only the issues or questions framed by this court when granting leave would be heard or entertained on the appeal to itself.
>
> It should be noted, however, that in *Sababumi* the court was dealing with an objection taken by counsel for the respondent, the effect of which was that certain grounds raised in the memorandum of appeal were outside the scope of the issues in respect of which leave to appeal had been granted by the Federal Court and, that consequently, it was not open to the appellant to raise those grounds.
>
> Although it might appear that what the court had there said was expressed in terms wide enough to preclude either party from raising in the Federal Court a point outside the scope of the issue in respect of which leave to appeal was given, whatever the circumstances, we do not consider this was what was intended by the court. As a matter of principle, there can be no justification whatsoever for depriving a respondent to an appeal of his general right to take any point open to him in order to hold his judgment. (See *Viking Askim Sdn Bhd v NUECM* [1990] 2 ILR 634

at p 638; *Waller & Son, Ltd v Thomas* [1921] 1 KB 541; *Property Holding Co Ltd v Clark* [1948] 1 KB 630 at p 637 (CA); *Errington v Errington & Woods* [1952] 1 KB 290 at p 300 (CA).) Apart from these cases we consider it pertinent to refer to the following passage in the judgment of Willmer LJ in *Thomas v Marconi's Wireless Telegraph Co Ltd* [1965] 2 All ER 598, CA (at p 600) which we consider especially relevant:

> On principle, I should have thought, it is plain that the position of a respondent, who is brought to this court on appeal against his will, is necessarily quite different from that of an appellant who initiates the proceedings in this court. It is right that an appellant should be precluded from raising here for the first time a point not taken below; but there is no similar justification for shutting out a respondent, who is brought here on appeal, from taking any point in support of the judgment which he has obtained (emphasis added.)

In our view, therefore, it was open to ABOM to raise these other points in order to hold their judgment and both counsel for the Minister and NUBE were quite correct in taking no objection.

We would go further and say that notwithstanding the *Sababumi* case, it would be wrong to assume that the last word has been spoken regarding the position of even an appellant who seeks to argue in this court — a Court of Last Resort — a ground which falls outside the scope of the issues regarding which leave to appeal has been granted.

Looking at the Rules, we note that sub-r (4) of r 47 shows that the appellant is 'confined to matters, issues or questions in respect of which leave to appeal has been granted', and sub-r (1) of r 57 *emphasises* the same point by providing that 'Subject to Rule 47(4) … the appellant shall prepare a memorandum of appeal setting forth the grounds of objection to the decision appealed against and specifying the points of law or fact which are alleged to have been wrongly decided …', but sub-r (2) of r 57 makes the important *concession* to the appellant by providing that 'the appellant shall not at the hearing without the leave of the court put forward any other ground of objection …' (emphasis added).

Clearly, therefore, having regard to these provisions, the Federal Court has the *power* and therefore the *discretion* to permit an appellant to argue a ground which falls outside the scope of the questions regarding which leave to appeal had been granted in order to avoid a miscarriage of justice. These are matters which *Sababumi* does not appear to have addressed — perhaps, because they were not raised in argument — and so, the focus of the decision lay elsewhere, more particularly, having decided the question of power against the appellant, understandably, it did not address the issue of *discretion*.

[32] The framing of one or more issues for consideration by this court is a matter governed by the Rules of the Federal Court 1995. And, as may be seen from the above quoted passage those rules in themselves contain one or more safety valves to ensure no injustice is done in consequence of procedural departures.

[33] In this context, I would refer to the judgment of Ahmad Fairuz JCA (now Chief Justice) in *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2001] 1 MLJ 561 where his lordship said:

> Our Federal Court in the case of *Tan Chwee Geok & Anor v Khaw Yen-Yen & Anor* [1975] 2 MLJ 188 at p 189 said:
>
> > The Rules of the Supreme Court are intended to facilitate, not impede, the administration of civil justice.
> >
> > In the bad old days in England from where we took our Rules, if you put a comma wrong you were thrown out of court, so strict were they about technicalities.
> >
> > But over the years this strictness gave way to common sense, and every time the Rules were amended it was with the object of removing fussy technicalities, and making it easier for parties to get justice.
> >
> > This changed attitude was reflected in the remarks of Lord Collins MR about 70 years ago in *Re Coles and Ravenshear*[1907] 1 KB 1:
> >
> > > Although a court cannot conduct its business without a code of procedure, the relation of the rules of practice to the work of justice is intended to be that of handmaid rather than mistress; and *the court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case* (emphasis added).
> >
> > And in the same case, Ali FJ said (at p 192):
> >
> > > The general principle, I think, is that rights of parties in an action are not to be defeated by technical objections.
> >
> > In this connection, we would also like to quote what this court had said in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd*[1995] 3 MLJ 331 at p 342, ie:
> >
> > > …After all, courts exist to do justice according to the law as applied *to the substantial merits of a particular case*… (emphasis added).
> >
> > Kaikaus J in *Imtiaz Ahmad v Ghulam Ali* PLD 1963 SC 382 at p 400 said:
> >
> > > *Any system which* by giving effect to the form and not to the substance *defeats substantive rights is defective to that extent*. The ideal must always be a system that gives to every person what is his (emphasis added).
> >
> > Bearing in mind the abovementioned authorities, I feel that the preliminary objection should not be allowed. The objection is indeed on a mere technicality.

[34] It is probably with this in mind that learned counsel for the respondent did not pursue with any zeal his argument that this appeal ought to be dismissed out of hand on the ground that the questions posed bear no direct relevance whatsoever to the facts and live issues in this case. Speaking for myself, I find no difficulty seeing where my task lies. It lies in adopting that course which will produce complete justice as between the parties. And I do not intend for a moment to allow any technicality to stand in my way of achieving that end.

[35] The factual matrix against which this appeal rests is not in dispute. It is set out in full in the judgment of the Court of Appeal delivered by my learned brother Mokhtar Sidin JCA. I would gratefully adopt his lordship's narrative. However, it is necessary to bear in mind when reading the narrative that the respondent before us was the appellant in the Court of Appeal. This is his lordship's summary of the facts.

> The appellant is a company incorporated in Malaysia. They have two factories, one at Kulai engaged in the extraction of crude palm oil ('CPO') only from the whole fruits and the other at Pasir Gudang, Johor engaged in the extraction of crude palm kernel oil ('CPKO') from the kernel of oil palm fruits. It is not disputed that the appellant are palm oil millers within the definition as provided for under the Palm Oil Research and Development Act 1979 ('the 1979 Act') and the Palm Oil (Research Cess) Order 1979 ('the 1979 Order'). Clauses 2 and 3 of the Palm Oil (Research Cess) Order 1979 provide as follows:
>
> 2 In this Order 'palm oil miller' means a person who carries on the business of extracting oil from oil palm fruits and/or seeds.
>
> 3 Every palm oil miller shall pay a cess of four ringgit for every metric ton or part of a metric ton of crude palm oil produced by him.
>
> It is also not disputed that the 1979 Order was amended in 1982 and 1984. The amendment in 1984 is not relevant for the purpose of this appeal. The 1982 amendment is relevant in view of the definition found in para 2:
>
> 2 The Palm Oil (Research Cess) Order 1979 is amended by substituting the following paragraph or para 1;
>
> Citation and commencement
>
> 1 This Order may be cited as the Palm Oil Commencement (Research Cess) Order 1979 and shall come into force on 1 January 1980 in respect of cess on crude palm oil extracted from oil palm fruits and on 1 July 1980 in respect of cess on crude palm oil extracted from oil palm seeds.
>
> As can be seen from this paragraph, cess was imposed on crude palm oil extracted from oil palm fruits and from 1 July 1980, cess was to be imposed on crude palm oil extracted from oil palm seeds.
>
> Pursuant to the 1979 Order, the respondents imposed cess in respect of the crude oil extracted from the oil palm fruits ('CPO') and from 1 July 1980 imposed cess in respect of crude oil extracted from the kernel of the oil palm fruits ('CPKO)'. The respondents imposed cess on CPKO on the ground that it was crude oil extracted from the seed. The appellant did not dispute the imposition of cess on CPO but disputed the cess imposed on CPKO. In the present appeal, the respondents had imposed the sum of RM363,034 as cess on CPKO to which the appellant had paid. As I have stated earlier, the appellant disputed the imposition of cess in respect of CPKO and took up the present action seeking a declaration that the respondents were not empowered to levy and collect the cess on CPKO and for the refund of the cess imposed and paid by the appellant. The respondents in turn counterclaimed for the sum of RM255,300 where the cess imposed on CPKO had not been paid by the appellant.

The appellant contended that the 1979 Act and the Orders made thereunder did not cover CPKO. The imposition of cess was only on CPO and not on CPKO.

In order to understand the difference between CPO and CPKO, the appellant submitted and not disputed by the respondents, that CPO is the crude oil extracted from the oil palm fruits while CPKO is the crude oil extracted from the kernel of the crushed fruits of the oil palm. The crude oil extracted from the kernel is done chemically whereas the CPO is extracted by crushing the whole fruits. As I have stated earlier, it is also not disputedthat the appellant maintained two factories, one in Kulai and the other in Pasir Gudang. The factory at Kulai extracted CPO by crushing the whole oil palm fruits. The kernel of the crushed fruits were then collected and sent to the Pasir Gudang factory where CPKO were extracted chemically.

It is the contention of the learned counsel for the appellant that CPKO is not crude oil from the oil palm fruits or seeds as stipulated by s 2 of the 1979 Act which provides the following definition:

> 'palm oil' means oil, whether in crude or further processed form, extracted from oil palm fruits and seeds.

The respondents, on the other hand, contended that CPKO is crude oil extracted from the seeds of the oil palm, and as such, the respondents have the right to impose cess on CPKO under the 1979 Act and the orders made thereunder. The learned judge in the court below held that CPKO is crude oil extracted from the seeds of the oil palm and the respondents were right in imposing the cess on CPKO extracted by the appellant at their Pasir Gudang factory. Being dissatisfied with the decision, the appellant appealed to this court.

[36] All that remains for me to add is that the Court of Appeal allowed the appeal, reversed the High Court and entered judgment for the instant respondent. The present appellant then sought and obtained leave to appeal against the decision of the Court of Appeal.

[37] I am in agreement with learned counsel for the respondent that the central question in this appeal is whether the Palm Oil (Research Cess) Order 1979 ('the 1979 Order') is *ultra vires* the parent statute, namely, the 1979 Act. This is a question of law of considerable public importance having regard to the impact of the cess levy by the appellants on one of our economic lifelines.

[38] Three items of *ultra vires* were identified by learned counsel for the respondent. First, the absence of any authority in the 1979 Act, in particular, ss 2 and 14 thereof to collect cess from palm oil millers. Second the levying of cess on CPKO is in itself *ultra vires* ss 2 and 14 of the 1979 Act because the definition of 'palm oil' in s 2 does not include 'kernel'. Third, the 1979 Order is an unauthorised enlargement of ss 2 and 14 of the 1979 Act through the use of the expression 'and/or' in para 2 which purports to define a 'palm oil miller'. To elaborate, s 2 of the 1979 Act uses the single conjunction 'and' to define 'palm oil' as meaning 'oil, whether in crude or further processed form,

extracted from oil palm fruits *and* seeds'. However, para 2 of the 1979 Order uses the alternative conjunctions 'and/or' in place of the single conjunction 'and' when defining a 'palm oil miller' as meaning 'a person who carries on the business of extracting oil from oil palm fruits *and/or* seeds'. It is counsel's argument that the Honourable Minister has therefore enlarged the definition in s 2 of the 1979 Act without sanction from the parent statute. This is what is known as substantive *ultra vires*.

[39] Before considering the three alleged instances of *ultra vires*, it is apposite to re-state the law governing unauthorised action by the executive as authoritative guidance for the courts in the hierarchy of our judicature. For this purpose, it is convenient to identify executive acts as being either purely administrative in nature on the one hand or as quasi-legislative. Quasi-legislative power is exercised by a member of the administration — usually one of His Majesty's Ministers — pursuant to a power conferred by Parliament to make subsidiary legislation.

[40] The starting point for the present discussion is the source in our jurisdiction of what Anglo-Saxon jurisprudence initially termed as 'administrative law' and which it now refers to by the more generic expression 'public law' and in which is housed the concept of *ultra vires* or illegality. I use the expression 'illegality' as an alternative to *ultra vires* by freely borrowing it from Lord Diplock's Delphic pronouncement in *Council of Civil Unions v Minister for the Civil Service* [1985] AC 374. Lord Diplock there said:

> By 'illegality' as a ground for Judicial Review I mean that the decision maker must understand directly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justifiable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

[41] In *R Rama Chandran v Industrial Court Malaysia* [1997] 1 MLJ 145, Edgar Joseph Jr FCJ interpreted this part of Lord Diplock's speech as follows:

> Lord Diplock's first ground for challenge, namely, *'illegality', involves insisting that the authority or body whose decision is being impugned has kept strictly within the perimeters of their powers.* A good example of this is the case of *Westminster City Council v Great Portland Estates Plc* [1985] AC 661, *an ultra vires case*, involving judicial construction of the Town and Country Planning Act 1971. The question for decision was whether the Act permitted the relevant authorities, by resort to their development plans, to support the retention of traditional industries or was the ambit of the Act such as to permit only 'land use' aims to be pursued? It was held that 'the character of the use of the land, not the particular purpose of a particular occupier was the concern of planning and therefore the authority could not be seen to favour any particular occupant or class of occupant. By thus confining the relevant authority strictly to the four walls of the powers conferred upon them by the Act, the court was involved in the exercise of reviewing the impugned decision for substance and not just process (emphasis added).

[42] The relevant source of public law in our jurisdiction is the Federal Constitution, for it declares by its own terms in art 4(1) that it *is* the supreme law. It follows that what English lawyers refer to as 'administrative law' or 'public law' has no separate existence dehors the Constitution in our jurisdiction. All principles of administrative law or public law must find their place within the Constitution. These principles are to be derived through an interpretation of those provisions falling within Part II of the Constitution which guarantee to our citizens all those fundamental rights that are inherent in all human beings. It is the solemn duty of the judicial arm of Government — the courts who are the guardians of constitutional rights – to interpret the fundamental rights provisions in Part II of the Constitution prismatically, so that our citizens obtain the full benefit and value of those rights. And it is in this simple way, through the exercise of the court's interpretive jurisdiction that our public law gains momentum. Accordingly, it cannot be over-emphasised that on no account should our courts adopt a narrow and pedantic approach to constitutional interpretation.

[43] In truth, no authority is required for these axiomatic propositions. But should it be required then it may be found in at least three cases. The first of these is *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64 where in an oft quoted passage Lord Diplock said:

> In a constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to 'law' in such context as 'in accordance with law', 'equality before the law', 'protection of the law' and the like, in their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by makers of the Constitution that the 'law' to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be misuse of language to speak of law as something which affords 'protection' for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by art 5) of arts 9(1) and 12(1) would be little better than a mockery.

[44] Although *Ong Ah Chuan* concerns the interpretation of the fundamental rights provisions in the Singapore, the observations of Lord Diplock there applies with equal force to our Constitution: see *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204.

[45] The second authority is *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, where Raja Azlan Shah Ag LP said:

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions

must be construed broadly and not in a pedantic way — 'with less rigidity and more generosity than other Acts' (see *Minister of Home Affairs v Fisher* [1979] 3 All ER 21). A constitution is *sui generis*, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: 'A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms.' The principle of interpreting constitutions 'with less rigidity and more generosity' was again applied by the Privy Council in *Attorney General of St Christopher, Nevis and Anguilla v Reynolds* [1979] 3 All ER 129 at 136.

It is in the light of this kind of ambulatory approach that we must construe our Constitution.

[46] It is imperative that every word in the above quoted passage should be carved indelibly in our minds if we are to meaningfully perform our duty as interpreters of the supreme law.

[47] The third authority is *Reyes v The Queen* [2002] 2 AC 235 where Lord Bingham said:

As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution. But it does not treat the language of the Constitution as if it were found in a will or a deed or a charterparty. *A generous and purposive interpretation is to be given to constitutional provisions protecting human rights.* The court has no licence to read its own predilections and moral values into the Constitution, but it is required to *consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society*: see *Trop v Dulles* (1958) 356 US 86. (Emphasis added.)

[48] In the context of the present appeal, it is art 8(1), particularly the second limb of that Article, which is the relevant constitutional provision which houses the *ultra vires* doctrine.

[49] Article 8(1) has two limbs. The first limb guarantees equality before the law. In other words, it requires fairness in all forms of State action. As Thommen J said of the equipollent art 14 of the Indian Constitution in *Shri Sitaram Sugar Co Ltd v Union of India & Ors* [1990] 3 SCC 223 at p 251:

Any arbitrary action, whether in the nature of a legislative or administrative or quasi-judicial exercise of power, is liable to attract the prohibition of art 14 of the Constitution. As stated in *EP Royappa v State of Tamil Nadu* [1974] 4 SCC 3: 'equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic

while the other, to the whim and caprice of an absolute monarch'. Unguided and unrestricted power is affected by the vice of discrimination: *Maneka Gandhi v Union of India*. *The principle of equality enshrined in art 14 must guide every State action, whether it be legislative, executive, or quasi-judicial:* Ramana Dayaram Shettyv International Airport Authority *of India* [1979] 3 SCC 489 at 511-512, *Ajay Hasia v Khalid Mujib Sehravardi* [1981] 1 SCC 722 and *DS Nakara v Union of India* [1983] 1 SCC 305.

[50] The second limb guarantees equal protection of the law. This is the limb directly relevant to the present appeal. The act or omission of a member of the administration (whether a Minister or a civil servant) which is either: (i)beyond the power conferred upon him or her by an Act of Parliament; or (ii) constitutes an abuse of that power, denies to the person affected thereby, equal protection of the law and consequently runs foul of art 8(1). Accordingly, the doctrine of *ultra vires* in respect of acts whether purely administrative or in the exercise of a power to produce delegated legislation finds its place within the second limb of art 8(1).

[51] There are two additional matters that call for emphasis. Firstly, in our jurisdiction — unlike England — any subsidiary legislation to be valid must be *intra vires* the parent statute *and* the Federal Constitution. In MP Jain's *Administrative Law of Malaysia and Singapore* (3rd Ed), the learned author, whose views are entitled to great respect, has this to say:

> The parent statute may be constitutional, but the subsidiary legislation made thereunder may be unconstitutional. The court will strike down delegated legislation, as it strikes down any statute, if it comes in conflict, or does not conform, with a constitutional provision. Here again, reference has to be made to Constitutional Law to assess whether the regulation in question infringes a constitutional provision. The frame of reference to adjudge the validity of the regulation or subsidiary legislation is the Constitution.

[52] This view is amply supported by authority. In *Supreme Court Employees Welfare Association v Union of India* AIR 1990 334, Thommen J distilled from decided cases the principles that operate in the environment of administrative as well as delegated legislative acts by the executive. These principles apply with equal force in our jurisdiction. His Lordship said:

> Where the validity of a subordinate legislation (whether made directly under the Constitution or a statute) is in question, the court has to consider the nature, objects and scheme of the instrument as a whole, and, on the basis of that examination, it has to consider what exactly was the area over which, and the purpose for which, power has been delegated by the governing law.
>
> Rules are liable to be declared invalid if they are manifestly unjust or oppressive or outrageous or directed to an unauthorised end or violative of the general principles of the law of the land or so vague that it cannot be predicated with certainty as to what is prohibited by them or so unreasonable that they cannot be attributed to the power delegated, or otherwise disclose bad faith. In the words of Lord Russel of Kilowen CJ in *Kruse v Johnson* (1898) 2 QB 91 at 99:

> If, for instance, they were found to be partial or unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires'*.

In *Union of India v Cynamide India Ltd* AIR 1987 SC 1802 at 1805 Chinnappa Reddy J observed that price fixation being a legislative activity, it was:

> neither the function nor the forte of the court. We concern ourselves neither with the policy nor with the rates. But we do not totally deny ourselves the jurisdiction to enquire into the question, in appropriate proceedings, *whether relevant considerations have gone in and irrelevant considerations kept out* of the determination of the price (emphasis added by Thommen J)

In *SI Syndicate Ltd v Union of India* AIR 1975 SC 460, this court stated (at p 464 of AIR):

> Reasonableness, for purposes of judging whether there was an 'excess of power' or an 'arbitrary' exercise of it, is really the demonstration of a reasonable nexus between the matters which are taken into account in exercising a power and the purposes of exercise of that power.

In *PCS Mills v Union of India* AIR 1973 SC 537, this court, referring to statutory fixation of fair price, stated (at p 546 of AIR) :

> ... But this does not mean that Government can fix any *arbitrary price or a price fixed on extraneous considerations or is such that it does not secure a reasonable return* on the capital employed in the industry. Such a fixation would at once evoke a challenge, both on the ground of its being inconsistent with the guidelines built in the subsection and its being in contravention of Arts 19(1)(f) and (g) ... (emphasis added by Thommen J)

See also observation to the same effect in *Shree Meenakshi Mills v Union of India* AIR 1974 SC 366.

Any arbitrary exercise of power by a public authority, whether or not it is in the nature of subordinate legislation, is liable to be condemned as violative of Article 14. As stated in *EP Royappa v State of Tamil Nadu* AIR 1974 SC 555:

> …equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch...

See also *Maneka Gandhi v Union of India* AIR 1978 SC 597, *Ajay Hasia v Khalid Mujib* AIR 1981 SC 487 and *DS Nakara v Union of India* AIR 1983 SC 130.

An act is *ultra vires* either because the authority has acted in excess of its power in the narrow sense, or because it has abused its power by acting in bad faith or for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness: see the principle stated by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680 at 685. Power is exercised in bad faith where its repository is motivated by

personal animosity towards those who are directly affected by its exercise. Power is abused even when it is exercised in good faith, but for an unauthorised purpose or on irrelevant grounds, etc. As stated by Lord Macnaghten in *Westminster Corporation v London and North Western Railway* [1905] AC 426 at 430:

> …It is well settled that a public body invested with statutory powers such as those conferred upon the Corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second, if not in the first ...

This principle was restated by this court in *Barium Chemicals Ltd v Company Law Board* AIR 1967 SC 295 (at p 323):

> …Even if (the statutory order) is passed in good faith and with the best of intention to further the purpose of the legislation which confers the powers, since the Authority has to act in accordance with and within the limits of that legislation, its order can also be challenged if it is beyond those limits or is passed on grounds extraneous to the legislation or if there are no grounds at all for passing it or if the grounds are such that no one can reasonably arrive at the opinion or satisfaction requisite under the legislation. In any one of these situations it can well be said that the authority did not honestly form its opinion or that in forming it, it did not apply its mind to the relevant facts.

The true position thus appears to be that, just as in the case of an administrative action, so also in the case of subordinate legislation (whether made directly under the Constitution or a Statute), its validity is open to question if it is ultra vires the Constitution or the governing Act or repugnant to the general principles of the laws of the land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it. (Emphasis added.)

[53] Secondly, when determining whether a particular piece of subsidiary legislation is *intra* or *ultra vires* its parent statute, the court is wholly unconcerned with its underlying principles or policy. The subsidiary legislation may have the most laudable social policy at its heart: yet if it is beyond the terms of the delegation extended by Parliament it is invalid.

[54] In *McEldowney v Forde* [1971] AC 632, Lord Diplock while explaining the role of the courts in the context of the *unwritten constitution* of the United Kingdom had this to say:

> The division of functions between Parliament and the courts as respects legislation is clear. Parliament makes laws and can delegate part of its power to do so to some subordinate authority. The courts construe laws whether made by Parliament directly or by a subordinate authority acting under delegated legislative powers. *The view of the courts whether particular statutory or subordinate legislation promotes or hinders the common weal is irrelevant.* The decision of the courts as to what the words used in the statutory or subordinate legislation mean is decisive. Where the validity of subordinate legislation made pursuant to powers delegated by Act of Parliament to a subordinate authority is challenged, the court has a three-fold task: first to determine the meaning of the words used in the Act of Parliament itself to describe the subordinate legislation

which that authority is authorised to make, secondly to determine the meaning of the subordinate legislation itself and finally to decide whether the subordinate legislation complies with that description. (Emphasis added.)

[55] Despite these views appearing in Lord Diplock's dissenting speech in the House, it has acquired much repute and has been quoted by Peh Swee Chin FCJ in this court in *Kerajaan Malaysia v Wong Pot Heng* [1997] 1 MLJ 437. In *Wong Pot Heng & Anor v Kerajaan Malaysia* [1992] 2 MLJ 885, Eusoff Chin J at first instance quoted the foregoing passage in Lord Diplock's dissent in *McEldowney v Forde* [1971] AC 632 and said:

There is also no doubt whatsoever that the courts have jurisdiction to declare invalid a delegated legislation if in making it, the person/body to whom power is delegated to make the rules or regulations, acted outside the legislative powers conferred on him/it by the Act of Parliament under which the rules or regulations were purported to have been made.

[56] That a court is entirely unconcerned with the underlying principles or policy or popularity of a piece of subsidiary legislation is a proposition that applies equally in a jurisdiction with a written constitution. Thus in *Maharashtra SBOS & HS Education v Paritosh* AIR 1984 SC 1548, Balakrishna Eradi J when delivering the judgment of the Indian Supreme Court said:

The court cannot sit in judgment over the wisdom of the policy evolved by the legislature and the subordinate regulation-making body. It may be a wise policy which will fully effectuate the purpose of the enactment or it may be lacking in effectiveness and hence calling for revision and improvement. But any drawbacks in the policy incorporated in a rate or regulation will not render it *ultra vires* and the court cannot strike it down on the ground that in its opinion, it is not a wise or prudent policy, but is even a foolish one, and that it will not really serve to effectuate the purposes of the Act. The legislature and a delegate are the sole repositories of the power to decide what policy should be pursued in relation to matters covered by the Act and there is no scope for interference by the court unless the particular provision impugned before it can be said to suffer from any legal infirmity, in the sense of its being wholly beyond the scope of the regulation-making power or its being inconsistent with any of the provisions of the parent enactment or in violation of any of the limitations imposed by the Constitution.

[57] A little later, in the same judgment, the learned judge added:

In the light of what we have stated above, the constitutionality of the impugned regulations has to be adjudged only by a three-fold test, namely, (1) whether the provisions of such regulations fall within the scope and ambit of the power conferred by the statute on the delegate; (2) whether the rules/regulations framed by the delegate are to any extent inconsistent with the provisions of the parent enactment; and lastly (3) whether they infringe any of the fundamental rights or other restrictions or limitations imposed by the Constitution.

[58] In my considered judgment, it is the threefold test formulated by Balakrishna Eradi J in the above quoted passage that should be applied by our

courts when determining the validity of a piece of subsidiary legislation. It must never be forgotten by our courts when adjudicating upon a public law case that all State action must in appropriate cases be in accordance with the terms of any relevant written law but must *in all cases* be in accordance with the provisions of the Federal Constitution, in particular the fundamental liberties guaranteed by Part II thereof.

[59] It is with these principles in mind that I now turn to consider the question whether the 1979 Order is tainted by substantive *ultra vires*. To recapitulate, the first submission is that the 1979 Act does not authorise the collection of cess from palm oil millers. To determine if there is merit in this complaint, all that is necessary is to examine the Act itself. There is no dispute — indeed there cannot be any — that the 1979 Act does not define the term 'palm oil miller'. Section 14(1) by which Parliament delegates subsidiary law making authority to the Minister reads as follows:

> 14(1) The Minister may, after consultation with the Board and with the Minister of Finance, make orders for the imposition, variation or cancellation of a research cess on palm oil; and the orders may specify the nature, the amount and rate and the manner of collection of the cess.

[60] Be it noted that the section empowers the Minister, *inter alia*, to impose research cess on *palm oil*: not on palm oil millers. The point of construction here is therefore uncomplicated and straightforward. The 1979 Act did not give the Minister power to make orders imposing a research cess on palm oil millers. And it is not open to this court to read into the section an implied power enabling the Minister to do so. Such a course would constitute unauthorised judicial legislation and a breach of the doctrine of separation of powers enshrined in the Federal Constitution.

[61] In Malaysia, the Federal Constitution has entrusted the law making power to Parliament and the State Assembly of each of the several States of the Federation. While the courts through the common law recognise the power of Parliament to delegate some of its legislative power, it is equally the constitutional duty of the courts to ensure that no excessive delegation takes place. Hence the well settled principle that a provision in a statute conferring power on a member of the executive to enact subsidiary legislation must be construed strictly. This is particularly so where the subsidiary legislation is one that imposes a financial levy — call it a tax or charge or cess or whatever you may — upon the whole or any section of the public. It is difficult to find a clearer authority on the point than the decision of the English Court of Appeal in *Attorney General v Wilts United Dairies Ltd* (1921) 37 TLR 884, which was affirmed by the House of Lords. See (1922) 38 TLR 781. In that case Atkin LJ said:

> In these circumstances, if an officer of the executive seeks to justify a charge upon the subject made for the use of the Crown (which includes all the purposes of the public revenue), he must show, in clear terms, that Parliament has authorized the

particular charge. The intention of the Legislature is to be inferred from the language used, and the grant of powers may, though not expressed, have to be implied as necessarily arising from the words of a statute; but in view of the historic struggle of the legislature to secure for itself the sole power to levy money upon the subject, its complete success in that struggle, the elaborate means adopted by the Representative House to control the amount, the conditions and the purposes of the levy, the circumstances would be remarkable indeed which would induce the court to believe that the Legislature had sacrificed all the well-known checks and precautions, and, not in express words, but merely by implication, had entrusted a Minister of the Crown with undefined and unlimited powers of imposing charges upon the subject for purposes connected with his department.

[62] And in a later passage, Atkin LJ said:

It makes no difference that the obligation to pay the money is expressed in the form of an agreement. It was illegal for the Food Controller to require such an agreement as a condition of any licence. It was illegal for him to enter into such an agreement. The agreement itself is not enforceable against the other contracting party; and if he had paid under it he could, having paid under protest, recover back the sums paid, as money had and received to his use.

[63] In the same case, Scrutton LJ said:

It is conceivable that Parliament, which may pass legislation requiring the subject to pay money to the Crown, may also delegate its powers of imposing such payments to the Executive, but in my view the clearest words should be required before the Courts hold that such an unusual delegation has taken place. As Chief Justice Wilde said in *Gosling v Veley* (1850) 12 QB 328 at 407, 116 ER 891 at 921: 'The rule of law that no pecuniary burden can be imposed upon the subjects of this country, by whatever name it may be called, whether tax, due, rate or toll, except upon clear and distinct legal authority established by those who seek to impose the burthen, has been so often the subject of legal decision that it may be deemed a legal axiom, and requires no authority to be cited in support of it.

[64] In *Gruen Watch of Canada Ltd v Attorney General of Canada* [1950] OR 429, McRuer CJ, after citing *Attorney General v Wilts United Dairies Ltd* said:

It is for the legislative body to decide in every case what power is to be delegated to any administrative body, and in each case the administrative tribunal is confined to the express authority delegated to it and to the authority that may arise by necessary implication. *In no case is the exercise of the delegated authority more carefully scrutinized than in the case where it is claimed that it gives a right to impose any financial burden on the subject*. (Emphasis added.)

[65] More recently, the House of Lords in *McCarthy & Stone (Developments) Ltd v Richmond Upon Thames Borough Council* [1992] 2 AC 48, referred to with approval the passages in the judgments of Atkin and Scrutton LJJ in *Attorney General v Wilts United Dairies Ltd.*

[66] So much for the requirement of clear statutory language in the delegation of powers: particularly, taxation power in the context of s 14 of the 1979 Act.

But there is another aspect of s 14 that calls for discussion. It is this. If you look carefully enough at the section, you will find that it does not identify the payer of the research cess. Now, it is for Parliament to identify the person who is to pay the particular levy. In other words, if a person is to be made liable for a tax, charge or other levy, such liability must be expressed in plain and unambiguous language in the particular statute. If Parliament does not do so, then it is not open to a delegate of the power to impose the levy to make the identification. Both these propositions are well settled and have been expressed on more than one occasion.

[67] Thus, in *Comptroller-General of Inland Revenue, Malaysia v T* [1970] 2 MLJ 35, Gill FJ, in relation to the first of the propositions, said:

> In the absence of a clear intention that tax should be imposed, the respondent is not liable to payment for the sum granted for the abrogation of his contract. It is an important canon in the construction of revenue Acts that the subject is not to be taxed unless there are clear words in the Act imposing such a tax. In this connection, Lord Blackburn said in the House of Lords in *Coltness Iron Co v Black* (1880–81) 6 App Cas 315, 330:
>
> > No tax can be imposed on the subject without words in an Act of Parliament clearly shewing an intention to lay a burden on him. …and I think the only safe rule is to look at the words of the enactment and see what is the intention expressed by those words.
>
> Lord Simonds in *Russell v Scott* [1948] 2 All ER 1 at 5 reasserted the same rule of construction when he addressed the House of Lords in the following words:
>
> > My Lords, there is a maxim of income tax law which, though it may sometimes be over-stressed, yet ought not to be forgotten. It is that the subject is not to be taxed unless the taxing statute unambiguously impose the tax on him. It is necessary that this maxim should on occasion be reasserted and this is such an occasion.

[68] So far as the second of the propositions is concerned one need only cite *Deputy Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678, where at p 684, the High Court of Australia in its joint judgment said:

> In *MacCormick v FC of T* (1983) 158 CLR 622, it was held that the recoupment tax, for which the Act provides, answers the usual description of a tax. Amongst the characteristics which were said by the majority to bring it within that description was the fact that the tax is not arbitrary. This was, as the relevant passage shows, a reference to the fact that liability can only be imposed by reference to ascertainable criteria with a sufficiently general application and that *the tax cannot lawfully be imposed as a result of some administrative decision based upon individual preference unrelated to any test laid down by the legislation*. To say that a tax may not be arbitrary in that sense does not, of course, preclude the pejorative description of a tax as arbitrary in the sense that the criteria which are laid down for its application give it a harsh or unreasonable incidence with regard to either its subject-matter or objects. To describe a tax as arbitrary in the latter sense is to do so in a manner which does not go to its validity. (Emphasis added.)

[69] Applying the foregoing principles to the present instance two matters emerge. First, the 1979 Act does not authorise the imposition of the research cess upon palm oil millers. Second, s 14 of the 1979 Act does not impose any liability upon oil palm millers to pay research cess. Based on these matters it is my considered judgment that the 1979 Order is *ultra vires* the 1979 Act. The 1979 Order is therefore null and void and of no effect. This conclusion makes it unnecessary for me to consider the other grounds on which *ultra vires* is asserted. It is equally unnecessary to consider the arguments concentrated on the issues framed. However, in deference to the effort that counsel on both sides have put into presenting their respective arguments, it is only proper that I express my views on the framed issues.

[70] The test as to whether a particular written law is a taxing statute is that formulated by Lord Thankerton when delivering the advice of the Board in *Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Ltd* [1933] AC 168 at 175:

> The main issue of this appeal is whether the adjustment levies are taxes, and, if so, whether they are direct taxes. If both these questions are to be answered affirmatively, it matters not that they incidentally affect property and civil rights in the Province, for taxation necessarily has that effect, and the closing words of s 91 will exclude any operation of para 16 of s 92. In that event it would be unnecessary to consider the remaining contentions of the respondents.
>
> In the opinion of their Lordships, the adjustment levies are taxes. *They are compulsorily imposed* by a statutory Committee consisting of three members, one of whom is appointed by the Lieutenant-Governor in Council, the other two being appointed by the dairy farmers within the district under s 6 of the Act. *They are enforceable by law*, and a certificate in writing under the hand of the chairman of the Committee is to be prima facie evidence in all courts that such amount is due by the dairy farmer (s 11). A dairy farmer who fails to comply with every determination, order or regulation made by a Committee under the Act is to be guilty of an offence against the Act (s 13), and to be liable to a fine under s 19. *Compulsion is an essential feature of taxation*: *City of Halifax v Nova Scotia Car Works, Ltd* [1914] AC 992. Their Lordships are of opinion that the Committee is a public authority, and that the imposition of these levies is for public purposes.

[71] There is no requirement that the levy must be imposed by a public authority in order for it to be judged a tax. See *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462; *Australian Tape Manufacturers Ltd v The Commonwealth* (1991) 177 CLR 480.

[72] In the present case, the 1979 Order makes non payment of research cess an offence punishable by a fine of RM1,000 or to a term of imprisonment not exceeding six months or to both such punishments. There you have the element of compulsion required by the *Thankerton* test. Accordingly, it is my considered judgment that the research cess is indeed a tax.

[73] The next issue posed by the appellant is whether the 1979 Act as a taxing statute should receive a purposive interpretation. I must be forgiven if express my astonishment at the need for a question the answer to which is so obvious and covered by high authority. Yet, we were regaled by authorities by counsel on both sides, each urging a different resolution of the question. Now, when it comes to a question of statutory interpretation, this court — or indeed any court — is not bound to select one or the other of the rival interpretations advanced by counsel. The court should think for itself and come to its own conclusion because the responsibility to interpret a statute rests with the court.

[74] In *Accident Towing & Advisory Committee v Combined Motor Industries Pty Ltd* [1987] VR 529 the court was pressed by counsel not to adopt a construction that was not supported by the appellant in that case. McGarvie J's response merits recall. His Honour said:

> During the hearing of the appeals when it was suggested from the Bench that the right to be on the register depends on the location of the authorised depot the suggestion received little, if any, support from counsel for the Authority. For the respondents, Mr Magee vigorously contested the suggestion. More than once Mr Magee submitted that it was not open to the Court to adopt a construction of the legislation which the appellants had not in argument supported. A pertinent response to that submission is that: 'Judges are more than mere selectors between rival views — they are entitled to and do think for themselves': *Saif Ali v Sydney Mitchell and Co (A Firm)* [1980] AC 198, at p 212, per Lord Wilberforce.

[75] *Pepper v Hart* [1993] AC 593, a case with which the whole if not a substantial number of the legal profession is familiar was a case that had to with a taxing statute, the Finance Act 1976. Lord Griffiths there said:

> The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted.

[76] Further, Parliament via s 17A of the Interpretation Acts 1948 and 1967 requires the court to adopt a purposive approach. That section reads:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[77] So, there is no doubt that even a taxing statute must be given a purposive approach. But that is quite different from saying, as learned counsel for the appellant is saying, that a taxing or revenue law statute may be read so as to confer power upon a member of the administration to collect a tax when there is neither an identification of the taxpayer nor conferment of a power to make subsidiary legislation in that behalf. If this court were to accept the argument

of counsel for the appellant, then we would not be promoting the purpose or object of the 1979 Act but be defeating it. For, in such event we would, through unauthorised legislative power, be re-writing statute.

[78] In my judgment s 17A has no impact upon the well established guidelines applied by courts from time immemorial when interpreting a taxing statute. Section 17A and these guidelines co-exist harmoniously for they operate in entirely different spheres when aiding a court in the exercise of its interpretive jurisdiction. The correct approach to be adopted by a court when interpreting a taxing statute is that set out in the advice of the Privy Council delivered by Lord Donovan in *Mangin v Inland Revenue Commissioner* [1971] AC 739:

> First, the words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices. As Turner J said in his (albeit dissenting) judgment in *Marx v Inland Revenue Commissioner* [1970] NZLR 182 at 208, moral precepts are not applicable to the interpretation of revenue statutes.
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> Secondly, '...one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption so to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used'. (Per Rowlatt J in Cape *Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64 at 71, approved by Viscount Simons LC in *Canadian Eagle Oil Co Ltd v Regeim* [1945] 2 All ER 499, [1946] AC 119).
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> Thirdly, the object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.
>
> Fourthly, the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction.

[79] In my respectful view, s 17A of the Interpretation Acts 1948 and 1967 neatly fits into and is complementary with the third principle in the judgment of Lord Donovan. Hence, the governing principle is this. When construing a taxing or other statute, the sole function of the court is to discover the true intention of Parliament. In that process, the court is under a duty to adopt an approach that produces neither injustice nor absurdity: in other words, an approach that promotes the purpose or object underlying the particular statute albeit that such purpose or object is not expressly set out therein. Imposing a tax by means of subsidiary legislation on a person not identified in the parent Act produces an absurd and unjust result and therefore does not promote its purpose or object.

[80] For the reasons already given, this appeal fails. It is dismissed. The orders made by the Court of Appeal are affirmed. The appellant must pay the

costs of this appeal to the respondent to whom the deposit in court shall be paid out.

Appeals dismissed.

Reported by Loo Lai Mee